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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

~~JAN 29 1997~~ AUG 29 1997

CATHY A. CATTERSON,
CLERK
U.S COURT OF APPEALS

UNITED STATES OF AMERICA,	)	No. 95-50314
	)	
Plaintiff-Appellee,	)	D.C.No.
	)	CR95-293-001-LN
	)	
v.	)	MEMORANDUM*
	)	
HIPPOLITO NUNEZ GUTIERREZ,	)	
	)	
Defendant-Appellant	)	

Appeal from The United States District Court

For the Southern District of California

Leland C. Nielsen, District Judge , Presiding

Argued and Submitted August 5, 1997

Pasadena, California

Before: BROWNING, BRUNETTI , and TROTT, Circuit Judges.

We affirm Hippolito Nunez Gutierrez's Conviction.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

I. SUBPOENAS

We reject Gutierrez's contention that the district court abused its discretion by refusing to issue the subpoenas he requested. To obtain a subpoena under Fed. R. Crim. P. 17(b), a defendant must aver facts which, if true, would be relevant to an issue in the case. United States v. Sims, 637 F.2d 625, 627 (9th Cir. 1980). The district court need not issue subpoenas that seek cumulative testimony. Id. at 629.

Donna Moore's testimony was unnecessary because Gutierrez failed to explain why the frequency with which Mangosing, Vasquez, and Nunez called each other was relevant to any issue in the case.

The district court could not determine the relevance of Mark Comment's or Moses Rodriguez's testimony because Gutierrez did not describe the statements about which they would testify.

Steven Douglas' testimony that officials had charged Nunez with an unrelated drug offense was not evidence that Nunez had the opportunity to commit the crimes at issue in this case or that Vasquez knew at the time of her arrest that Nunez was a drug trafficker.

The district court did not err in refusing to subpoena Raul Ayala. Gutierrez failed to show that Ayala would provide relevant impeachment evidence. Mangosing testified she thought Nunez might have paid Ayala but she was not certain. Gutierrez did not aver that Ayala would testify Mangosing knew Nunez had paid him.

Testimony from Lourdes Pulidio, Carlos Tavison, and the

Internal Revenue Service that Vasquez lied to them would have been cumulative; there was abundant testimony that Vasquez was frequently untruthful.

Gutierrez had no right to call Nunez for the sole purpose of compelling him to invoke his Fifth Amendment privilege before the jury. See United States v. Livacoli, 604 F.2d 613, 624 (9th Cir. 1979). Gutierrez did not request immunity for Nunez, and the government, which was under no obligation to grant immunity, gave no indication it would do so.

II. CROSS-EXAMINATION

A. Vasquez

The district court did not err in limiting Gutierrez's cross-examination regarding the incarcerations of Nunez and David Cardenas. Gutierrez sought to show Vasquez lied about Gutierrez's being the source of the cocaine, but the jury could reach this conclusion only by making the impermissible inference that Nunez and Cardenas acted in conformity with their bad characters and provided the cocaine Vasquez was transporting. See Fed R. Evidence. 404(b). The exclusion of proffered bias or impeachment evidence does not create a Confrontation Clause problem unless it "expose[s] the jury to facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." Delaware v. Van Arsdall, 475 U.S. 673, 680 (quotation omitted).

The testimony was not admissible under United States v. Brady, 561 F.2d 1319 (9th Cir. 1977). In Brady, testimony about a witness' prior heroin deals was admissible to prove the identity of the source of the heroin at issue. Id. At 1320. Prior bad acts are evidence of identity when their similarity tot he crime charged indicates all the acts must be the handiwork of the same person. See 22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure §5246, at 512-13 (1978). Gutierrez does not allege that the drug offenses for which Nunez and Cardenas were incarcerated involved a modus operandi that would identify them as the source of the cocaine in this case.

The district court did not err in refusing to allow Gutierrez to elicit testimony that Vasquez had been fired from a bank for stealing. This testimony had limited value as specific-instance evidence of Vasquez's untruthfulness because there was no indication Vasquez lied to perpetrate the theft. See Fed. R. Evidence. 608(b).

The district court did not err in limiting questions about Vasquez's receiving income from illegal sources. Vasquez admitted that she had been paid to transport drugs. Additional testimony on this subject would have been repetitious and only marginally relevant.

B. Mangosing

The district court did not err in limiting questions about Mangosing's hepatitis immunization; Mangosing's drug use was only

marginally relevant.

The district court did not err in limiting Gutierrez's questions about whether Vasquez's family disliked Nunez as being, at best, only marginally relevant.

The district court also properly limited Gutierrez's questions about how many times Vasquez asked Mangosing to accompany her on the South Carolina trip. Gutierrez was able to test Mangosing's ability to recall by asking questions that elicited more relevant testimony.

III. ADMISSION OF EVIDENCE

Gutierrez' cross-examination of Agent Burke created the misimpression that Burke had conducted a shoddy investigation and had been unable to verify Vasquez's claim that a pager number she said she used to contact Gutierrez actually belonged to him. This selective cross-examination opened the door for the government to introduce Gutierrez's address to show that Burke had substantially corroborated Vasquez's statement. See United States v. Beltran-Rios, 878 F.2d 1208, 1212 (9th Cir. 1989); United States v. Segall, 833 F.2d 144, 148 (9th Cir. 1987).

IV. RESTRICTING TESTIMONY OF DEFENSE WITNESSES

The district court did not abuse its discretion when it limited Carlos Juarez's testimony. Vasquez testified that Nunez might have paid Juarez, but she was not certain. Gutierrez argues that Juarez

would have provided testimony to impeach Vasquez. However, Gutierrez did not assert in his proffer to the district court that Juarez would provide relevant impeachment evidence because Gutierrez did not say Juarez would testify Vasquez knew Nunez paid him. Moreover, Gutierrez presented other evidence that Vasquez had a motive to lie to protect Nunez by eliciting her admission that Nunez was her boyfriend.

The district court did not abuse its discretion in limiting Leticia Vargas' testimony that federal agents had asked her questions about Nunez's possible involvement in this case. This testimony was marginally relevant. The fact that federal agents had investigated Nunez's possible involvement did not show he was actually involved.

The district court did not abuse its discretion in limiting Agent Burke's testimony that Vasquez and Mangosing had lied to customs agents. Agent Burke testified they had lied before the district court limited the direct examination. Further testimony to the same effect would have been repetitious.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
DEC 12 1997

CATHY A. CATTERSON,
CLERK
U.S COURT OF APPEALS

UNITED STATES OF AMERICA,	) No. 95-50314
	)
Plaintiff-Appellee,	) D.C.No.
	) CR95-293-001-LN
	)
v.	)
	) ORDER
HIPPOLITO NUNEZ GUTIERREZ,	)
	)
Defendant-Appellant.	)

Before: BROWNING, BRUNETTI , and TROTT, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestions for an en banc rehearing. And no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-50314

CT/AG#: CR95-293-01-LN

FILED
FEB 2 1998

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

/s/ P. Alberda Deputy

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HIPPOLITO NUNEZ-GUTIERREZ,

Defendant-Appellant.

APPEAL FROM the United States District Court for the Southern District of California (San Diego).

THIS CAUSE, came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California (San Diego) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here

ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered August 29, 1997.

ENTERED ON 2/4/98

A TRUE COPY
CATHY A CATTERSON
Clerk of Court
ATTEST

JAN 12 1998

By: /s/ Reinaldo Guzman
Deputy Clerk

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal Rule of Evidence, Rule 403 states as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence, Rule 608 states as follows:

> (a) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609 , may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The Fifth Amendment to the United States Constitution states as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

The Sixth Amendment to the United States Constitution states as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; and to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.